KOK WAH KUAN

v.

PENGARAH PENJARA KAJANG

HIGH COURT MALAYA, KUALA LUMPUR
HELILIAH MOHD YUSOF J
[CRIMINAL APPLICATION NO: 44-62-2003]
12 JANUARY 2004

CRIMINAL PROCEDURE: *Habeas corpus - Invalid ground for - Child applicant convicted of murder - Child applicant ordered detained at Yang di-Pertuan Agong's pleasure pursuant to s. 97(2) Child Act 2001 - Argument by counsel that s. 97(2) unconstitutional - Review of legislative power and competence of Parliament sought by way of habeas corpus - Whether valid ground for issue of habeas corpus*

CRIMINAL PROCEDURE: *Jurisdiction of court - High Court - Review of legislative power and competence of Parliament sought by way of habeas corpus - Whether such issues outside purview of High Court - Whether such issues reserved exclusively for determination of Federal Court*

The child applicant was convicted of murder by the High Court. In lieu of the death sentence, the High Court invoked s. 97(2) of the Child Act 2001 ('the Act') and ordered the detention of the applicant at the Yang di-Pertuan Agong's pleasure. The applicant applied for the issue of a writ of habeas corpus. At the hearing of the application, the DPP raised a preliminary objection, arguing that: (i) the writ of *habeas corpus* was not available on a order of detention made by a High Court of competent jurisdiction; and (ii) the application was an abuse of process since the applicant had the right of appeal and had in fact appealed to the Court of Appeal. In opposing the objection, counsel for the applicant contended that the High Court's order that the applicant be detained at the pleasure of the Yang di-Pertuan Agong was unconstitutional and not on the authority of a legal or lawful power. Applicant's counsel further argued *inter alia*: (i) that by giving the Yang di-Pertuan Agong, as an officer of the Executive, the power to determine the measure of the applicant's punishment under s. 97(2) of the Act, the legislature had infringed the fundamental principle of separation of powers implicit in the Federal Constitution, which was based upon the Westminster model; and (ii) s. 97(2) of the Act was void to the extent of providing for the detention of the applicant

at the pleasure of the Yang di-Pertuan Agong, having regard to art. 4(1) of the Federal Constitution which made the Constitution the supreme law of the land.

Held (upholding the preliminary objection):

[1] What the High Court was being asked to review was not the decision-making process of an executive authority but to review a legislative power. What was being alleged in the instant case was a legislative encroachment into judicial power. Such an issue was, by virtue of art. 4 read with art. 128, reserved exclusively for the determination of the Federal Court, as it fell outside the purview of the High Court. (pp 357 f & 362 e)

[2] In the instant proceedings, what was being sought to be reviewed was the competence of Parliament which specifically conferred upon the High Court certain powers under s. 97 of the Act to pass sentence in accordance with that section. That sentence was alleged to be illegal on the ground that it was an executive order. The use of the process of an application for habeas corpus to challenge the legality of the sentence was a wrong use of the process and was indeed questionable. The jurisdiction of the High Court was also being invoked to make a determination that the sentence had resulted in the applicant being unlawfully detained on the implied ground that he had not been afforded a fair hearing by an independent and impartial court. (p 364 d-g)

[3] Even if it were within the competence of the High Court to declare s. 97(2) of the Act void, which was not the case, it would lead to an absurd situation that while the trial of the applicant before the High Court had been properly conducted in the lawful exercise of a judicial power to conduct trials, the sentence was void resulting in the court having to order the release of the applicant. This could not be the object of review on *habeas corpus* if the exercise resulted in a process running parallel to the appeal where a court of coordinate jurisdiction in effect reviewed the decision of another court of coordinate jurisdiction. (p 366 b-c)

[4] In the instant application, there were questions of policy which were not justiciable questions. The application was not an abuse in the full sense but to the extent that it was a wrong use of the mode of the process to review the powers of Parliament. The High Court would be acting in excess of its powers if it were to continue with the hearing on the merits of the application in violation of art. 4(3). (pp 367 h & 368 a)

Case(s) referred to:

Abed Hussein v. United Kingdom [1996] 22 EHRR 1 ***(refd)***
Adegbenro v. Akintola & Anor [1963[3 All ER 544 ***(refd)***
Ah Thian v. Government of Malaysia [1976] MLJ 112 ***(refd)***
BR Rao v. State of Orisa [1971] SC 2197 ***(refd)***
Dato' Menteri Othman Baginda & Anor v. Dato Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29 ***(refd)***
Dato' Yap Peng v. Public Prosecutor [1987] 1 MLJ 311 ***(refd)***
Director Of Public Prosecutors of Jamaica v. Mollison [2003] 2 WLR 1160 ***(refd)***
Ex Parte Corke [1954] 2 All ER 440 ***(refd)***
Gurbachan Singh's application [1963] 1 MLJ 74 ***(refd)***
Hinds v. The Queen [1977] AC 195 ***(refd)***
Loh Kooi Choon v. Government of Malaysia [1977] 2 MLJ 187 ***(refd)***
Merdeka University Bhd v. Government of Malaysia [1981] 2 MLJ 356 ***(refd)***
Ong Ah Chuan v. PP [1981] 1 MLJ 64 ***(refd)***
PP v. Datuk Harun Hj Idris [1976] 2 MLJ 116 ***(refd)***
R (on the application of Anderson) v Secretary of State for the Home Department [2002] 4 All ER 1089 ***(refd)***
Re Kestle [1980] 2 NZLR 337 ***(refd)***
Stafford v. UK [2002] 13 BHRC 260 ***(refd)***
Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor [1999] 1 CLJ 481 CA ***(refd)***
The Government of the State of Kelantan v. The Government of the Federation of Malaya and Tunku Abdul Rahman Putra AI-Haj [1963] 29 MLJ 359 ***(refd)***

Legislation referred to:

Child Act 2001, s. 97(2)
Federal Constitution, arts. 4(1), (3), 128

Other source(s) referred to:

Card Cross & Jones, *Criminal Law*, 15th edn, p 7.25
Muhammad Suffian Hashim, *An Introduction to the Constitution of Malaysia*, 2nd edn, p 97
0 Hood Phillips in *Constitutional and Administrative Law*, 7th edn, pp 29-30

For the applicant - Karpal Singh; M/s Karpal Singh & Co
For the respondent - Tun Abdul Majid Tun Hamzah (Mohd Hanafiah Zakaria & Sharyza Alis)

Reported by Andrew Christopher Simon

JUDGMENT

Heliliah Mohd Yusof J:

In this application for a writ of *habeas corpus*, the facts briefly leading to the application is as follows:

On 24 July 2003 the applicant was found guilty and convicted of an offence under s. 302 of the Penal Code by the High Court, Kuala Lumpur. The death sentence being a mandatory sentence under s. 302 of the Penal Code, the High Court in Kuala Lumpur invoked the provisions of s. 97 of the Child Act 2001 (the Act 2001).

On the day of the hearing Encik Tun Majid, senior deputy public prosecutor appearing for the respondents raised a preliminary objection which was premised on two grounds:

(a) the writ of *habeas corpus* is not available on an order of detention made by the High Court of competent and coordinate jurisdiction.

(b) the application for a writ of *habeas corpus* is an abuse of process of the court as the applicant has the right of appeal and has indeed appealed to the Court of Appeal against the decision of the High Court in Kuala Lumpur Criminal Trial No. 45-27-2002.

In the present case before me learned counsel for the applicant has referred to the provisions of art. 5(2) of the Federal Constitution of Malaysia (the Federal Constitution) and s. 365 of the Criminal Procedure Code.

I now turn to the order in pursuance of which the applicant has now been detained. The parts relevant to the proceedings is reproduced verbatim:

DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR WILAYAH PERSEKUTUAN, KUALA LUMPUR

Perbicaraan Jenayah No. 45-27-2002

Pendakwa Raya

Lawan

KWK

Perintah Tahanan Di Bawah Sek. 97(2)
Akta Kanak-Kanak 2001
(Akta 611 Undang-Undang Malaysia)

BAHAWASAYA KWK telah dituduh melakukan kesalahan membunuh di bawah seksyen 302 Kanun Keseksaan yang membawa hukuman mati.

BAHAWASANYA pada 1hb Julai 2003 penama tersebut telah didapati bersalah atas kesalahan tersebut.

BAHAWASANYA Mahkamah mendapati bahawa penama tersebut merupakan seorang kanak-kanak semasa melakukan kesalahan dan tidak boleh dijatuhkan hukuman mati.

BAHAWASANYA Mahkamah ini telah memerintahkan supaya penama tersebut ditahan selama yang diperkenankan oleh DULI YANG MAHA MULIA YANG DI PERTUAN AGONG.

BAHAWASANYA Mahkamah ini akan merujuk kes ini kepada pihak berkuasa untuk mendapatkan perintah-perintah selanjutnya daripada Yang di Pertuan Agong di bawah seksyen 97(2) Akta Kanak-Kanak 2001.

The learned counsel for the applicant has contended that the application should not be dismissed in limine and in opposing the preliminary objection has contended that the order of the High Court of Kuala Lumpur whereby the applicant was ordered to be detained in prison during the pleasure of the Yang Di Pertuan Agong is unconstitutional and not on the authority of a legal or lawful power. Before elaborating on this argument it is appropriate to mention that Mr. Karpal Singh thus relies on art. (5) cl. (2) of the Federal Constitution which stipulates:

(2) Where a complaint is made to a High Court or any Judge thereof that a person is being unlawfully detained the Court shall inquire into the complaint and, unless satisfied that the detention order is lawful, shall order him to be produced before the Court and release him.

Counsel also relied on s. 365 of the Criminal Procedure Code with reference to the power of the High Court to make certain orders which includes the following *inter alia*:

The High Court may whenever it thinks fit direct:

(a) that any person who is alleged to be illegally or improperly detained in public or private custody within the limits of Malaysia be set at liberty.

Before dealing with the submission of the learned counsel for the applicant the question posed by the learned Senior Federal Counsel is whether in the present circumstances, the case is one where it is appropriate for the writ of *habeas corpus* to be granted. The case of *Re Kestle* [1980] 2 NZLR 337 explains the position. In that case a *habeas corpus* application was filed in the Supreme Court on the ground of jurisdictional error whereby the applicant was tried by a jury not authorized by law to try him. The Court of Appeal of

New Zealand having affirmed the conviction hence the application for *habeas corpus*. In order to elicit his argument learned counsel for the respondents referred to the following passages:

> The applicant claims that there was a jurisdictional error which vitiated his trial and subsequent conviction. That error was his trial by a jury not authorized by law to try him. (See *R v. Bell* [1958] NZLR 449). The use of *habeas corpus* to test jurisdictional error is discussed by Professor Wade in his book on *Administrative Law* (4th Edition 1977) p 521:
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> > ***Habeas corpus* cannot be used as a means of appeal, but only of review**. In other words, the court is concerned with the question whether the order of detention is made within jurisdiction or ought to be quashed, but not with the question whether it is correct on its merit. This is merely the distinction between appeal and review which runs right through administrative law. Accordingly *habeas corpus* will be granted if it can be shown that the order of detention is *ultra vires* on any of the normal grounds.
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> A similar view to that taken by Professor Wade is taken by RJ Sharpe in his book published in 1976 *The Law of Habeas Corpus*. He says at pp 59-60:
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> > It is submitted that this review of the cases reveals that the scope of review on *habeas corpus* is very flexible. When review is possible, the issue of jurisdiction is open, and the broad definition given to that term will usually make an error of law subject to review. Apart from jurisdictional review, there is the further possibility of review for patent error, the limits of which are only to be determined by what material the court will examine.
> >
> > Perhaps the most important factor in any given case is to consider the nature of the decision or proceeding to be reviewed. With respect to certain proceedings, *habeas corpus* is thought by the courts to be an inappropriate remedy, and in those cases it will be virtually impossible to get relief even though relief may be theoretically possible. The best example is perhaps the refusal of the English courts to review convictions by common law courts, even where an error of jurisdiction is alleged. More recently, this reluctance seems to have spread to summary convictions as well, and it can probably be said that *habeas corpus* will simply not be used by the courts as a post-conviction remedy.
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> The Crown did not contest the proposition that *habeas corpus* will lie for review arising out of jurisdictional error. In fact, it accepted that the decided cases show that it is still used for such purpose in appropriate cases ... A reading of those cases indicates the use by the Courts of the writ of *habeas corpus* to review questions of jurisdiction and we are satisfied that it does so exist for such purpose.

Several other cases were cited but in summary the following are borne out:

(a) per Yong J in the *Gurbachan Singh's application* [1963] 1 MLJ 74. Cases have established unequivocally the principle that a writ of *habeas corpus* cannot be granted to persons who are serving sentences passed by courts of competent jurisdiction and unless the applicant's conviction is set aside by the proper appellate court, he is lawfully in custody, serving a lawful sentence.

(b) *Habeas corpus* is not a means of appeal against conviction and sentence. If convicted persons are not satisfied with the trial court's judgment their remedies lie in their appeal to the High Court, the Federal Court (and in the present also to the Court of Appeal but of course no longer to the Privy Council. This second aspect was also dealt with by Lord Goddard CJ in *Ex Parte Corke* [1954] 2 All ER 440 where his Lordship stated, *inter alia*, that *habeas corpus* is not a means of appeal. And his Lordship also further stated that before a writ (ie, *habeas corpus*) can issue or leave can be given to apply for a writ an affidavit must be before the court showing some ground on which the court can say that the applicant is unlawfully detained.

References were also made to the *Law of Habeas Corpus* by RJ Sharpe where on the subject of challenging a criminal conviction on *habeas corpus* the author opined (p. 57):

> Since *habeas corpus* is not a discretionary remedy the existence of an alternate remedy does not afford grounds for refusing relief on *habeas corpus*. Whether the other, perhaps more direct, remedy could still be used, or whether the applicant has forgone his right to use it, its existence should not preclude or affect his right to apply for *habeas corpus*.
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> This principle has not been universally followed, however, and there are cases where the writ has been refused because an appeal was thought to be more appropriate. Some of these cases may depend upon a finding that the error alleged did not go to jurisdiction and there can be little doubt that a right of appeal may influence the court to characterize an error as being non-jurisdictional. This is especially true in cases where it is sought to challenge a criminal conviction on *habeas corpus*. The courts have shown a certain determination to restrict the growth of collateral methods of attacking convictions. They seem to prefer to have the matter raised by appeal, although it must be said that this is a tendency rather than a rule of universal application.

Mr. Karpal brought forth a response to the above arguments in the form of certain judicial statements in two cases. The first is *BR Rao v. State of Orisa* [1971] SC 2197. The Supreme Court of India, clearly, indicated *habeas corpus*

was not wholly excluded just because a person was in custody on the authority of an order of a court of competent jurisdiction when holding at p. 2199:

> Such a writ (of *habeas corpus*) is not granted where a person is committed to jail custody by a court of competent jurisdiction by an order **which *prima facie* does not appear to be without jurisdiction or wholly illegal** and we are not satisfied that the present case is not such a case. [emphasis added]

It is according to Mr. Karpal fallacious to say *habeas corpus* is wholly excluded in the case of the applicant on account of his having been convicted by a court of competent jurisdiction. To support this contention the case of *Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor* [1999] 1 CLJ 481 was cited, the relevant part of which was:

> The expressions 'unlawfully detained' and 'detention' in Art. 5(4) of the Federal Constitution do not apply to the case of a person held in the prison in execution of a sentence passed by a court of competent jurisdiction. The only remedy is that of appeal under s. 307 or s. 358 of the CPC or an application for the court to exercise its powers of revision under s. 323 of the CPC or s. 35 of the Courts of Judicature Act 1964. The only instance where *habeas corpus* may exceptionally lie would be a case where the court passing sentence had no jurisdiction to do so. Absence of jurisdiction must be patent upon the face of the record and not by having recourse to matters outside the record.
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> ... The charge against the appellant under s. 377D of the Penal Code (FMS Cap 45) is one which the Sessions Court had jurisdiction to try. It also had the jurisdiction to pass the sentence of six months imprisonment upon the appellant. Therefore, the appellant's case did not come within the exception and *habeas corpus* was not available to him as a matter of law.

Learned counsel for the respondents Encik Tun Majid has referred to art. 121(1) of the Federal Constitution. The High Court in Kuala Lumpur that sentenced the appellant derived its jurisdiction from this Article which states *inter alia* that the High Court shall have such jurisdiction and powers as may be conferred by or under federal law, the federal law for the present purpose being the Courts of Judicature Act 1964 CJA 1964). Section 22 vests the High Court, *inter alia*, with the jurisdiction to try all offences committed within its local jurisdiction.

Subsection 2 states that the "High Court may pass any sentence allowed by the law". Chapter XX of the Criminal Procedure Code however states in s. 183 that if the accused is convicted the court shall pass sentence according to law. The law applicable here is the Act 2001 and the provision which is alleged to be unconstitutional and which is alleged to have caused the jurisdictional error is s. 97(1) of the Act 2001. The whole section is reproduced:

97.(1) A sentence of death shall not be pronounced or recorded against a person convicted of an offence if it appears to the Court that at the time when the offence was committed he was a child.

(2) *In lieu* of a sentence of death, the Court shall order a person convicted of an offence to be detained in a prison during the pleasure of -

(a) the Yang di-Pertuan Agong if the offence was committed in the Federal Territory of Kuala Lumpur or the Federal Territory of Labuan; or

(b) the Ruler or the Yang di-Pertua Negeri, if the offence was committed in the State.

(3) If the Court makes an order under subsection (2), that person shall, notwithstanding anything in this Act -

(a) be liable to be detained in such prison and under such conditions as the Yang di-Pertuan Agong or the Ruler or the Yang di-Pertua Negeri may direct; and

(b) while so detained, be deemed to be in lawful custody.

(3) If a person is ordered to be detained at a prison under subsection (2), the Board of Visiting Justices for that prison -

(a) shall review that person's case at least once a year;

and

(b) may recommend to the Yang di-Pertuan Agong or the Ruler or the Yang di-Pertua Negeri on the early release or further detention of that person,

and the Yang di-Pertuan Agong or the Ruler or the Yang di-Pertua Negeri may thereupon order him to be released or further detained, as the case may be.

The High Court in passing the sentence on 24 July 2003 was exercising its jurisdiction within the terms of s. 22(1) paragraph a of the Courts of Judicature Act 1964. As mentioned above under sub-s. (2) of the same section the High Court may pass any sentence allowed by law and the law is in the Act 2001. The brunt of Mr. Karpal's contention however is that the sentencing process is still a judicial process and his arguments are:

(1) By giving the Yang di-Pertuan Agong, as an officer of the executive, the power to determine the measure of the applicant's punishment under s. 97(2) of the Act 2001, the Legislature has infringed the principle of separation of powers implicit in the Federal Constitution which is based on the Westminster model;

(2) Section 97(2) of the Act 2001 is void to the extent of providing for the detention of the applicant at the pleasure of the Yang di-Pertuan Agong having regard to the provisions of art. 4(1) of the Federal Constitution which makes the Constitution the supreme law of the land. Section 97(2) infringes the provisions of the art. 5(1) which states, "No person shall be deprived of his life or liberty save in accordance with law', and the Act 2001 is a federal law.

(3) By being detained at the pleasure of the Yang di-Pertuan Agong, the applicant is being deprived of his personal liberty, not in execution of the sentence or order of a court, but at the discretion of the Executive. The applicant has not been afforded a fair hearing by an independent and impartial court because the sentencing of an accused person is part of the hearing, and in the applicant's case, the sentence passed is effectively passed by the Executive, and not by a court independent of the Executive. Further, s. 97(2) and 97(3) provides for a mandatory penalty of detention of the applicant at the pleasure of the Yang di-Pertuan Agong with s. 97(4) providing for release by the Yang di-Pertuan Agong on the advice of the Board of Visiting Justices, a non-judicial review board, thus contravening the basic concept of separation of the three organs of Government the Legislature, Executive and the Judiciary;

(4) It is implicit in the very structure of the Federal Constitution that judicial power, however it be distributed from time to time between the various courts, must continue to be vested in persons appointed to hold judicial office in the manner and on terms set forth in the Constitution. Punishment is an integral part of the administration of justice and, as such, cannot be committed to the hands of the Executive.

(5) Under s. 97(2) of the Act 2001, the Yang di-Pertuan Agong acts on the advice of the Cabinet pursuant to art. 40(1) of the Federal Constitution (the relevant part of which reads, "In the exercise of his functions under this Constitution or federal law the Yang di-Pertuan Agong shall act in accordance with the advice of the Cabinet ...") and, therefore, in an Executive capacity;

In opposition to the decision in *Re Kestle supra*, Mr. Karpal has relied on the decision in *Director Of Public Prosecutors of Jamaica v. Mollison* [2003] 2 WLR 1160.

Mollison's case was a decision of the Privy Council in which the respondent Mollison was convicted (at the age of 19) of capital murder. Under the laws of Jamaica where the murder was committed in the cause of or furtherance of a robbery when Mollison was then aged 16. Mollison was sentenced under

s. 29(1) of the Juvenile Act 1951 to be detained at the Governor General's pleasure. The Court of Appeal in Jamaica refused his application for leave to appeal against conviction but the court was concerned whether the sentence was compatible with the Constitution of Jamaica. That issue was decided in Mollison's favour when the Court of Appeal determined that the sentence of detention during the Governor General's pleasure was set aside and a sentence of life imprisonment substituted with a recommendation that the respondent be not considered for parole until he had served a term of 20 years.

The Director Public Prosecutors appealed to the Board against the setting aside of sentence of detention during the Governor General's pleasure. The judgment of the Privy Council which was delivered by Lord Bingham of Cornhill dealt with matters which are necessary to mention as they have a bearing on the arguments of counsel for the applicant.

Two issues were addressed by Lord Bingham one of which is not pertinent for the case before me. But the issue that could be mentioned was this: whether the sentence of detention during the Governor's pleasure authorized by s. 29 of the Juveniles Act 1951 conferring on the Governor General as an officer of the executive the power to determine the measure of punishment to be inflicted on an offender is compatible with the constitution in Jamaica.

It is noteworthy that the term used was "compatibility" with the constitution of Jamaica. Before elaborating on aspects of Lord Bingham's judgment the following are the provisions of the law mentioned in the judgment:

Section 29 of the Juveniles Act 1929

> (1) Sentence of death shall not be pronounced on or recorded against a person convicted of an offence if it appears to the court that at the time when the offence was committed he was under the age of 18 years, but in place thereof the court shall sentence him to be detained during Her Majesty's pleasure, and, if so sentenced, he shall, notwithstanding anything in the other provisions of this Law, be liable to be detained in such place (including, save in the case of a child, an adult correctional centre) and under such conditions as the Minister may direct, and while so detained shall be deemed to be in legal custody.
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> (4) The Governor General may release on licence any person detained under subsection (1) or (3) of this section. Such licence shall be in such form and contain such conditions as the Governor General may direct, and may at any time be revoked or varied by the Governor General. Where such licence is revoked the person to whom it relates shall return forthwith to such place as the Governor General may direct, and if he fails to do so may be arrested by any constable without warrant and taken to such place.

Section 2 of the Constitution (of Jamaica)

Subject to the provisions of sections 49 and 50 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.

Section 4 of the Jamaica (Constitution) Order in Council 1962, provides:

> All laws which are in force in Jamaica immediately before the appointed day shall (subject to amendment or repeal by the authority having power to amend or repeal any such law) continue in force on and after that day, and all laws which have been made before that day but have not previously been bought into operation may (subject as aforesaid) be brought into force, in accordance with any provision in that behalf, on or after that day, but all such laws shall, subject to the provisions of this section, be construed, in relation to any period beginning on or after the appointed day, with such adaptations and modifications as may be necessary to bring them into conformity with the provisions of this Order.

Section 15(1) of the Constitution:

No person shall be deprived of his personal liberty save as may in any of the following cases be authorized by law ... (b) in execution of the sentence or order of a court, whether in Jamaica or elsewhere, in respect of a criminal offence of which he has been convicted.

Section 20(1) of the Constitution:

Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

It is also very necessary to note in addition that in the *Mollison*'s case both the director of public prosecutor and the solicitor general had accepted that s. 29 of the Juveniles Act 1951 infringed the rights guaranteed by, and was inconsistent with the aforesaid s. 15(1)(b) and s. 20(1) of the Constitution. The reason for this as explained by Lord Bingham was as follows:

> A person detained during the Governor General's pleasure is deprived of his personal liberty not in execution of the sentence or order of a Court but at the discretion of the executive. Such a person is not afforded a fair hearing by an independent and impartial Court because the sentencing of a criminal defendant is part of the hearing and in cases such as the present sentence is effectively passed by the executive and not by a Court independent of executives.

Three other matters are noteworthy of mentioned in respect of the judgment. Firstly, Lord Bingham also elaborated on what constitutes the sentence of detention during Her Majesty's pleasure which in the case of juveniles was exercised on behalf of Her Majesty by the Governor General. On this aspect Lord Bingham stated:

> 5. The sentence of detention during Her Majesty's pleasure originated in the United Kingdom for reasons which are not in doubt. In the course of time it came to be seen as inhumane to punish as if they were adults those who had, when committing the crimes, been children or young persons, not (in the eyes of the law) fully mature adults. The nature of the sentence also is not open to doubt. It has, of course, a punitive purpose, appropriately enough where a person above the age of criminal responsibility has been convicted of a very grave crime committed with the intent necessary to support conviction of murder. But a punitive purpose would usually be served by a determinate term of confinement, whether longer or shorter, and a key feature of this sentence is its indeterminacy: because the sentence is indeterminate, account may be taken of the youthful detainee's progress and development as he or she matures, by means of periodic reviews, and regard may be paid not only to retribution, deterrence and risk but also to the welfare of the young offender. If authority be needed for these uncontroversial observations it may be found in *The State of O'Brien* [1973] IR 50, 72, *R v. Secretary of State for the Home Department, Ex p Venables* [1998] AC 407, 498-500, 519-524, 530-532, Browne v. The Queen [2000] 1 AC 45, 47-49 and *V v. United Kingdom* [1999] 30 EHRR 121, 186, para 110. It was a sentence of this character which was transplanted from the United Kingdom to Jamaica, and there is nothing to suggest that the amendments made to section 29 as originally enacted on the effective substitution of the Governor General for Her Majesty were intended to alter the character of the sentence.

Secondly, there was a reference to the judgment of Lord Diplock in *Hinds v. The Queen* [1977] AC 195. In referring to the judgment of Lord Diplock in that case Lord Bingham stated:

> The main issue in that case concerned the constitutionality of a new court established by the Parliament of Jamaica under a post-independence statute to try those accused of firearms offences. There was however a subsidiary issue concerning the constitutionality of two sections of the statute, one of which prescribed a mandatory penalty of detention at hard labour during the Governor General's pleasure on conviction of certain offences, the other of which provided for release only by the Governor General on the advice of a largely non-judicial review board. In his exposition of the principles underlying what he called "the Westminster model" of constitution, Lord Diplock referred, at p. 212, to "the basic concept of separation of legislative, executive and judicial power", and observed: "It is taken for granted that the basic principle of separation of powers will apply

to the exercise of their respective functions by these three organs of government". He went on to observe, at p. 213:

> What, however, is implicit in the very structure of a Constitution on the Westminster model is that judicial power, however it be distributed from time to time between various courts, is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the Chapter dealing with the judicature, even though this is not expressly stated in the Constitution: *Liyanage v. The Queen* [1967] 1 AC 259, 287-288'.

Thirdly in commenting on the *Hinds* case, Lord Bingham clearly demonstrated that his Lordship was reluctant to depart from the reasoning in the Hinds case when he observed:

> The Court of Appeal majority relied heavily on the decision and reasoning in the *Hinds* case [1977] AC 195 when resolving his appeal in the respondent's favour: see Downer JA, at pp 6-13, and Bingham JA, at pp 41-46, in their respective judgments. It does indeed appear that the *sentencing provisions under challenge in the Hinds case were held to be unconstitutional not because of their repugnancy to any of the rights guaranteed by sections in Chapter III of the Constitution but because of their incompatibility with a principle on which the Constitution itself was held to be founded*. There appears to be no reason why (subject to the other arguments considered below) the reasoning in the Hinds case does not apply to the present case. It would no doubt be open to the Board to reject that reasoning, but it would be reluctant to depart from a decision which has stood unchallenged for 25 years, the more so since the decision gives effect to a very important and salutary principle. Whatever overlap there may be under constitutions on the Westminster model between the exercise of executive and legislative powers, the separation between the exercise of judicial powers on the one hand and legislative and executive powers on the other is total or effectively so. Such separation, based on the rule of law, was recently described by Lord Steyn as "a characteristic feature of democracies": *R (Anderson) v. Secretary of State for the Home Department* [2002] 3 WLR 1800, 1821-1822, para 50. In the opinion of the Board, Mr. Fitzgerald has made good his challenge to section 29 based on its incompatibility with the constitutional principle that judicial functions (such as sentencing) must be exercised by the judiciary and not by the executive. [Emphasis added]

In dismissing the appeal the Privy Council invoked the provisions of s. 4 of the Constitution of Jamaica (as indicated above) which enabled the court to make a modification such that in the impugned s. 29 the references to "Her Majesty" and the Governor General were substituted by references to the term "the court".

I consider it inadequate to refer to what has been expounded in the *Mollison*'s case without mentioning that the case is also closely interwoven with certain development in the United Kingdom in the field of judicial attitude towards the death sentence. The developments are very recent and I find that I am compelled to make specific mention of this as I have found that the decision in the *Mollison*'s case has adhered very closely to those recent developments.

What are the developments? The developments are related to the Human Rights Act 1998. For an explanation on the effect of this Act I take the opportunity to refer to the treatise *"Human Rights and Criminal Justice"* by Ben Emmerson QC and Andrew Ashworth QC [2001] for the purposes of elucidating the plausible position taken by the Privy Council in the *Mollison*'s case. Relevant excerpts are as follows:

> The European Convention for the Protection of Human Rights and Fundamental Freedoms is an international treaty adopted by the Member States of the Council of Europe and opened for signature in November 1950. The Convention was ratified by the United Kingdom in March 1951, and entered into force in September 1953.
>
> Any person, non-governmental organization or group of individuals situated within the jurisdiction of a contracting state has a right of individual petition to the European Court of Human Rights under Article 34 of the Convention.
>
> A decision of the Court is final and binding. Although the Court does not have jurisdiction to quash the decisions of a national authority, or to overturn a criminal conviction, its judgments are more than merely declaratory in nature. Under Article 41 of the Convention the Court has power to award "just satisfaction" to the victim of a violation in the form of compensation for pecuniary and non-pecuniary loss, and to make a full award of costs.
>
> The Convention came into force on September 23, 1953, but the Court did not begin functioning until 1959. In the first 15 years of its operation the Court heard an average of one case a year. In some years, it met only once and then only because it was required to do so under the Rules of Court for its plenary administrative session. Since then however, the Court's caseload has grown steadily, due partly to an increasing awareness of its existence among the citizens and lawyers of the member states, and partly to the enlargement of the Council of Europe itself.
>
> The decisions of the European Commission and Court of Human Rights have produced a body of case law which extends its influence far beyond the parties to the individual case. Whilst a given judgment is only binding on the state concerned, other Convention states will look to the judgment for guidance as to the compatibility of their own domestic law with the requirements of the Convention. In this way, the Convention has become "a constitutional instrument

of European public order in the field of human rights". As the former President of the Court has put it, the Convention is now "the single most important legal and political common denominator of the states of Europe in its widest geographical sense".

The influence of the Convention is not however confined to European legal systems. It was used as the basis for the human rights chapters in many of the independence constitutions adopted in Commonwealth Africa and the Commonwealth Caribbean. This was partly because British lawyers had played a central role in the drafting of the Convention, and partly because the United Kingdom had extended its obligations under the Convention to its dependent territories in 1953. The Convention was therefore an obvious source of inspiration for the Commonwealth constitutions. Commonwealth courts have come to accept the importance of interpreting equivalent constitutional guarantees in the light of their history and sources and, "wherever applicable, pronouncements on provisions similar to [constitutional human rights provisions] either by national courts or by international institutions". Given that the text of many of these constitutional human rights guarantees is the same or very similar to the Convention, it is hardly surprising that the judgments of the European Court of Human Rights have been cited with approval by the constitutional courts of Canada, New Zealand, South Africa, Hong Kong, India, Zimbabwe and Mauritius, amongst others, and have served as a useful source of guidance for the Privy Council in exercising its constitutional jurisdiction. This cross-fertilisation of jurisprudence reflects not only the close relationship of the various texts, but also the universality of the underlying concepts and values.

It is against the aforementioned background that I now turn to the question how the question of "Her Majesty's Pleasure" has been judicially considered in the case of *Abed Hussein v. United Kingdom* (ie, one of the cases included in the authorities furnished by the counsel for the applicant [1996] 22 EHRR 1. In this case the European Court of Human Rights held that juveniles convicted of murder and detained during Her Majesty's Pleasure under s. 53(1) of the Children and Young Persons Act 1933 are entitled to the same regular periodic review by the Parole Board as discretionary life sentence prisoners (para 53-54):

It is undisputed that in its statutory origins the expression 'during Her Majesty's pleasure' had a clearly preventative purpose and that - unlike sentences of life custody or life imprisonment - the word 'life' is not mentioned in the description of the sentence ..... . In the case of young persons convicted of serious crimes, the corresponding sentence undoubtedly contains a punitive element and accordingly a tariff is set to reflect the requirements of retribution and deterrence. However, an indeterminate term of detention for a convicted young person, which may be as long as that person's life, can only be justified by considerations based on the need to protect the public. These considerations, centred on an

assessment of the young offender's character and mental state and of his or her resulting dangerousness to society, must of necessity take into account any developments in the young offender's personality and attitude as he or she grows older ... . Against the foregoing background the Court concludes that the applicant's sentence, after the expiration of his tariff, is more comparable to a discretionary life sentence ... . The decisive ground for the applicant's continued detention was and continues to be his dangerousness to society, a characteristic susceptible to change with the passage of time. Accordingly, new issues of lawfulness may arise in the course of detention and the applicant is entitled under Article 5(4) to take proceedings to have these issues decided by a court at reasonable intervals.

Emmerson and Ashworth, *supra*, have also explained:

Parliament has given effect to this decision in section 28 of the Crime (Sentences) Act 1997, which extends to juveniles sentenced to HMP detention the same rights in the post-tariff phase of detention as those which apply to a discretionary life sentence prisoner (i.e. a right to periodic review by way of an oral hearing before an HMP panel of the Parole Board). [16-28]

Two aspects of the HMP procedure were challenged successfully by the applicants in *T and V v. United Kingdom*. The Court held unanimously that the fixing of the tariff by the Home Secretary, a member of the Executive, violates the applicants' right under Article 6(1) to a "fair and public hearing .... by an independent and impartial tribunal". The Court held that the fixing of the tariff period "amounts to a sentencing exercise", and that the Home Secretary "was clearly not independent of the executive." The applicants also challenged the sentence under Article 5(4), alleging that there was no provision for periodic judicial review of the lawfulness of continued detention. Once again, the Court unanimously found a violation:

> Given that the sentence of detention during Her Majesty's Pleasure is indeterminate and that the tariff was initially set by the Home Secretary rather than the sentencing judge, it cannot be said that the supervision required by Article 5(4) was incorporated in the trial court's sentence ... Moreover, the Home Secretary's decision setting the tariff was quashed by the House of Lords on 12 June 1997 and no new tariff has since been substituted. This failure to set a new tariff means that the applicant's entitlement to access to a tribunal for periodic review of the continuing lawfulness of his detention remains inchoate. It follows that the applicant has been deprived, since his conviction in November 1993, of the opportunity to have the lawfulness of his detention reviewed by a judicial body in accordance with Article 5(4).

The judgment in this case has already led to changes. The Home Secretary has relinquished his power, and the tariff will now be set by the trial judge in the same way as for adults subject to discretionary life sentences. The Lord Chief

Justice has issued a Practice Direction, which anticipates legislation to give statutory force to the new procedure, and which also sets out the various factors which judges should take into account when setting tariff periods for murder by offenders of all ages.

In addition to above it would appear that the approach in the United Kingdom on the question of the death penalty has also changed with the murder (Abolition of Death) Penalty Act 1965. An explanation on this is further found in Card Cross & Jones *"Criminal Law"*, 15th edn, extracts of which are (at p. 7.25):

Under the Murder (Abolition of the Death Penalty) Act 1965, the judge has a discretion, rarely exercised, to recommend to the Home Secretary, in open court, the minimum period of which should be served by the prisoner before the Home Secretary exercises the power of release of a convicted murderer on licence. The trial judge's statutory discretion to make a recommendation to the Home Secretary has in practice been superseded by a non-statutory procedure under which the judge writes to the Home Secretary with his view as to the period necessary to meet the 'tariff' period necessary for retribution and deterrence before the convicted murderer can be considered for release on licence. The Lord Chief Justice is then asked to give his view. Although the tariff is normally a fixed period of years, the Home Secretary can in an appropriate case lawfully fix a 'whole life tariff', provided that this is subject to periodic review. The Home Secretary is not obliged to accept the views put to him about the 'tariff'. It is he, not the judges, who is entrusted with the task of deciding on the prisoner's release and he is entitled to depart from the judges' advice and to have regard to broader considerations of a public character, including the likely public reaction to the prisoner's release. Moreover, the Home Secretary is entitled to extend a tariff which has been fixed and communicated if the tariff was fixed in ignorance of material facts which later emerge, e.g. as the result of a confession to further murders by the prisoner. It is lawful for the Home Secretary to refuse to release a mandatory life sentence prisoner who has served the tariff part of his sentence on broader grounds of public policy than apply to the fixing of the tariff. It is, for example, lawful for the Home Secretary to refuse to release such a prisoner, on the ground that there is a risk that he might, after release, commit serious non-violent offences.

These rules can be contrasted with rules that apply to a life sentence (whether automatic or discretionary) for any other offence. There, unless the trial judge decides not to do so because of the seriousness of the offence, he must specify what is in effect the tariff period and the Home Secretary is obliged to release the offender on licence, once that period has been served, if the Parole Board has recommended that continued confinement is no longer necessary for public protection. If the trial judge decides not to specify a period, the offender's position is similar to that of someone subject to the mandatory life sentence for

> murder, with the result that the decision about release is made by the Home Secretary. The procedure is essentially the same in relation to someone convicted of a murder committed while under 18 who has been ordered to be detained during Her Majesty's pleasure. The judge must specify the tariff period, unless he decides not to specify any such period because of the seriousness of the offence. However, and this is the difference, if the judge refrains from specifying a period, the Home Secretary must 'at the appropriate stage' direct that the case be referred to the Parole Board and the Home Secretary will be bound to release the offender on licence if the Board directs release. The 'appropriate stage' is when the Home Secretary has concluded that it is appropriate to give such a direction.

It is therefore not unexpected that the development of case law in United Kingdom is that "the process of statutory Interpretation is no longer dominated by a search for the intention of Parliament. Instead the court's first duty is to adopt any possible construction which is compatible with Convention rights "Only in the last resort should a court conclude that a compatible construction is impossible."

The case of *R (on the application of Anderson) v. Secretary of State for the Home Department* [2002] 4 All ER 1089 clearly illustrates the aforementioned excerpts:

> The appellant prisoner was serving a mandatory life sentence for murder. Both the trial judge and the Lord Chief Justice had recommended that he serve a minimum term of 15 years to meet the requirements of retribution and general deterrence, but the Secretary of State set the tariff at 20 years. The prisoner could not be considered by the Parole Board for release on life licence until he had completed the tariff. The power to release, on licence, an adult convicted of murder was itself exercisable, on the Board's recommendation, by the Secretary of State under s. 29 of the Crime (Sentences) Act 1997. No such recommendation could be made unless the Secretary of State had referred the case to the Board for its advice. The prisoner, who was nearing the end of the judicially recommended tariff period, applied for judicial review of the Secretary of State's decision to increase the tariff. The Divisional Court dismissed the application, and its decision was affirmed by the Court of Appeal. On his subsequent appeal to the House of Lords, the prisoner contended that the Secretary of State should not fix the tariff for a convicted murderer since that power was incompatible with a person's right, under Art 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), to have his sentence imposed by an independent and impartial tribunal. In response, the Secretary of State contended that, in fixing the tariff for a convicted murderer, he was administering a sentence already imposed, not imposing a sentence. In the event of the prisoner's submission being preferred, a further issue arose as to the relief to which he was entitled. In

particular, their Lordships were required to determine whether it was possible, under s. 3 of the 1998 Act, to construe s. 29 of the 1997 Act in a manner that was compatible with the convention by reading it as precluding participation by the Secretary of State.

The decision was as follows:

Held - (1) The Secretary of State should not play any part in fixing the tariff of a convicted murderer, even if he did no more than confirm what the judges had recommended. The fixing of such a tariff was a sentencing exercise, involving an assessment of the quantum of punishment that the convicted murderer should undergo. The Secretary of State's role was objectionable because he was not independent of the executive. The complete functional separation of the judiciary from the executive was fundamental since the rule of law depended on it. It followed that the Secretary of State's practice of setting the tariff for convicted murderers was incompatible with Art. 6(1). Accordingly, the appeal would be allowed, and the issue of relief therefore arose (see 17,18, 20-28, 32, 52-56, 61, 74-78, 84-87, 84-87 below); *Stafford v. UK* [2002] 13 BHRC 260 and *Benjamin v. UK* [2002] 13 BHRC 287 followed.

(2) It was not possible to read s. 29 of the 1997 Act as precluding participation by the Secretary of State. A conclusion to the contrary would not be judicial interpretation but judicial vandalism, giving s. 29 an effect quite different from that which Parliament had intended and going well beyond any interpretative process sanctioned by s. 3 of the 1998 Act. It followed in the instant case that the only relief that the prisoner could obtain was a declaration of incompatibility. Accordingly, their Lordships would declare that s. 29 of the 1997 Act was incompatible with the right, under Art 6 of the convention, to have a sentence imposed by an independent and impartial tribunal in that the Secretary of State was acting so as to give effect to s. 29 when he himself decided on the minimum period that had to be served by a mandatory life sentence prisoner before he was considered for release on life licence (see 30-32, 59-61, 81, 83-87 below).

In view of the relevance of art. 6 of the European Convention on Human Rights to the decision in the *Mollison* case the provision of that Article is reproduced. The interpretation given by the European Court on Human Rights on that provision had an effect on judicial precedent which is to be dwelt upon again in the context of the United Kingdom.

Article 6: Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable **time by an independent and impartial tribunal established by law**. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of

> juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. (emphasis added)

It is noted that the decision in both *Mollison*'s case and *Anderson*'s case are consistent not only because in both cases Lord Bingham was part of the quorum but also it was clear that both at the House of Lords and the Privy Council, the judicial attitude towards the European Convention on Human Rights had to be maintained and effect was being given by declarations of incompatibility. Both decision were consistent in giving effect to the interpretation and application of the aforesaid art. 6 of the Strasbourg Convention and thus ensure compliance with the Convention.

However before going further on the issue of compatibility of primary legislation the *Mollison*'s case also hinged on the issue of separation of powers, that is the very issue raised in the proceedings before me. There is no material emplaced before me as to the meaning of this doctrine. I wish therefore to refer in the first place to sourcebook material *Halsbury's Laws of England*, 4th Edition. Re-issue p. 21 states the following with reference to the doctrine:

> This doctrine, which is to the effect that in a nation which has political liberty as the direct object of its constitution no one person or body of persons ought to be allowed to control the legislative, executive and judicial powers or any one of them, has never in the strict form corresponded with the facts of English government mainly because, although the functions and powers of government are largely separated, the membership of the separate instruments of state overlap. Only in one aspect of the constitution can it be said that the doctrine is strictly adhered to, namely that by tradition, convention and law the judiciary is insulated from political matters.

Hilaire Barnett on *Constitutional and Administrative Law* (3rd edn, p. 14) opined:

> The essence of the doctrine is that the powers vested in the principle institutions of the State - legislature, executive and judiciary - should not be concentrated in the hands of any one institution. The object of such separation is to provide checks on the exercise of power by each institution and to prevent the potential for tyranny which might otherwise exist. A constitution with clearly defined boundaries to power, and provisions restraining one institution from exercising the power of another, is one in conformity with the doctrine of separation of powers. This arrangement is most readily achievable under a written constitution, although it is arguable whether, under any constitution, a pure separation of powers is possible, or indeed desirable ... . At the other end of the spectrum of

constitutional arrangements from a nearly 'pure' separation of powers is a totalitarian State or a purely monarchial State. Under such a constitution will be found a single figure, or single body, possessed with the sole power to propose and enact law, to administer the State, and both to apply and to adjudicate upon the law.

The decision in *Mollison*'s case refers to the Westminster model and therefore I find it compelling to mention certain observation on what that term means:

SA De Smith, 'Westminter's Export Models: The Legal Framework of Responsible Government' (1961-63) I Journal of Commonwealth and Political Studies, pp 2-16:

> The Westminster model will never be a legal term of art and the political scientist may also prefer to handle it circumspectly. In its widest sense it may be understood to comprise all the main features of the British Constitution. Of those features, some are not reproduced in the constitution of any commonwealth country. Even the Malayan monarchy is elective, and few would wish to compare the Canadian Senate or the Nigerian Houses of Chiefs with the House of Lords. Among the characteristic features of modern Commonwealth constitutions are the limitation of parliamentary sovereignty, guarantees of fundamental human rights, judicial review of the constitutionality of legislation, the transfer of the responsibility for terminating a superior judge's tenure of office from a legislative to a judicial forum, and the vesting of full control over the public service and the conduct of elections in the hands of independent commissions. The aim of these provisions is to capture the spirit and practice of British institutions; the methods of approach involve the rejection of British devices and the imposition of un-British fetters on legislative and executive discretion ..
>
> In its narrower sense - the sense in which the terms is here used - the Westminster model can be said to mean a constitutional system in which the head of state is not the effective head of government; in which the effective head of government is a Prime Minister presiding over a Cabinet composed of Ministers over whose appointment and removal he has at least a substantial measure of control; in which the effective executive branch of government is parliamentary inasmuch as Ministers must be members of the legislature; and in which Ministers are collectively and individually responsible to a freely elected and representative legislature ... .

In the case of *Ong Ah Chuan v. PP* [1981] 1 MLJ 64, 68 (a Privy Council case, on appeal from Singapore) Lord Diplock observed:

> In a constitution founded on the Westminster model and particularly that part of it that purports to assure to all individual citizens the continued enjoyment of

fundamental liberties or rights, references to 'law' in such contexts as 'in accordance with law', 'equality before the law', 'protection of the law', and the like, in their Lordships' view, refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution. It would have been taken for granted by the makers of the Constitution that the 'law' to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules. If it were otherwise it would be misuse of language to speak of law as something which affords 'protection' for the individual in the enjoyment of his fundamental liberties, and the purported entrenchment (by art 5) of arts 9(1) and 12(1) would be little better than a mockery ... .

Their Lordships are of opinion that decision of Indian courts on Part III of the Indian Constitution should be approached with caution as guides in the interpretation of individual articles in Part IV of the Singapore Constitution, and that decisions of the Supreme Court of the United States on that country's Bill of Rights, whose phraseology is now nearly two hundred years old, are of little help in construing provisions of the Constitution of Singapore or other modern Commonwealth Constitutions which follow broadly the Westminster model.

It would be beyond the scope of the present judgment to trace the constitutional development of the Federation but the very nature of Mr. Karpal's agreement invites me to mention the following in the context of the Constitution of Malaysia namely the position of the Yang di-Pertuan Agong and the judiciary. R H Hickling in *"Essays in Malaysian Law"* [1991] states "As we know the Constitution of Malaysia is based upon the Westminster model, by India out of Westminster".

I would however be erroneous if no reference is alluded to certain judicial pronouncements by the highest courts of the land as well as the High Court in Malaysia in matters of interpreting the Federal Constitution of Malaysia. They are found in the following cases:

(1) *The Government of the State of Kelantan v. The Government of the Federation of Malaya and Tunku Abdul Rahman Putra AI-Haj* [1963] 29 MLJ 359 per Thomson CJ (as he then was):

although the Constitution forms an important part of the municipal law of the country it is also part of an Agreement between the previously sovereign States that went to make up the Federation of Malaya and accordingly should be construed in the light of the principles generally applied to the interpretation of treaties. These are summarized in the following passage from *Wheaton's International Law* (6th Edition) page 522:

> The general principle is that treaties, being compacts between nations, are not to be subjected to the minute interpretation which in private law may result in defeating through technical construction the real purpose of the negotiators.

The second consideration is that the Constitution is primarily to be interpreted within its own four walls and not in the light of analogies drawn from other countries such as Great Britain, the United States of America or Australia. It was said by the Privy Council (per Lord Radcliffe), as recently as May this year, in the case of *Adegbenro v. Akintola* with reference to the Western Nigerian Constitution:

> it must be remembered that, as Lord Bryce once said, the British Constitution 'works by a body of understandings which no writer can formulate'; whereas the Constitution of Western Nigeria is now contained in a written instrument in which it has been sought to formulate with precision the powers and duties of the various agencies that it holds in balance. That instrument now stands in its own right; and, while it may well be useful on occasions to draw on British practice or doctrine in interpreting a doubtful phrase whose origin can be traced or to study decisions on the Constitutions of Australia or the United States where federal issues are involved, it is in the end of the wording of the Constitution itself that is to be interpreted and applied, and this wording can never be overridden by the extraneous principles of other Constitutions which are not explicitly incorporated in the formulae that have been chosen as the frame of this Constitution.

(2) *Loh Kooi Choon v. Government of Malaysia* [1977] 2 MLJ 187, 188-189 (Federal Court, Malaysia) Raja Azlan Shah FJ (as he then was)

> Whatever may be said of other Constitutions, they are ultimately of little assistance of us because our Constitution now stands in its own right and it is in the end the wording of our Constitution itself that is to be interpreted and applied, and this wording 'cannot be overridden by the extraneous principles of other Constitutions' (see *Adegbenro v. Akintola & Anor* [1963] 3 All ER 544, 551). Each country frames its constitution according to the genius and for the good of its own society. We look at other Constitutions to learn from their experiences, and from a desire to see how their progress and well-being is ensured by their fundamental law.

(3) *Dato' Menteri Othman bin Baginda & Anor v. Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29 (Federal Court, Malaysia) Raja Azlan Shah Ag LP (as he then was)

> In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary

statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way - 'with less rigidity and more generosity than other Acts' (see *Minister of Home Affairs v. Fisher* [1980] AC 319). A constitution is sui generis, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: 'A constitution is a legal instrument given rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms'. The principle of interpreting constitutions 'with less rigidity and more generosity' was again applied in the Privy Council in *Attorney-General of St Christopher, Nevis and Anguilla v. Reynolds* [1980] AC 637.

(4) In *Merdeka University Bhd v. Government of Malaysia* [1981] 2 MLJ 356 (High Court, Malaysia) Abdoolcader J said:

It will be necessary in connection with my discussion in this regard to deal with and construe certain provisions of the Federal Constitution and I should perhaps before doing so advert somewhat briefly and generally to the principles of constitutional interpretation which apply. The Privy Council held in *Minister of Home Affairs v. Fisher* [1980] AC 319, 329 that a Constitution should be construed with less rigidity and more generosity than other statutes (also *Attorney General of St Christoper, Nevis and Anguilla v. Reynolds* [1980] AC 637, 655) and as *sui generis*, calling for principles of interpretation of its own, suitable to its character, but added that respect must be paid to the language which has been used, and in *Teh Cheng Poh @ Char Men v. Public Prosecutor* [1980] AC 458, 468 said that in applying constitutional law the court must look behind the label to the substance. Barwick CJ said in the High Court of Australia in Attorney-General of the Commonwealth ex relatione *McKinley v. The Commonwealth of Australia* [1975] 135 CLR 1, 17: The only true guide and only course which can produce stability in constitutional law is to read the language of the Constitution itself, no doubt generously and not pedantically, but as a whole and to find its meaning by legal reasoning.

It said in *Public Prosecutor v. Datuk Harun bin Haji Idris* [1976] 2 MLJ 116, 120 that the Constitution is not to be construed in any narrow or pedantic sense *(James v. Commonwealth of Australia* [1936] AC 578, 614)

> but this does not mean that a court is at liberty to stretch or pervert the language of the Constitution in the interests of any legal or constitutional theory, or even, I would add, for the purpose of supplying omissions or of correcting supposed errors. The High Court of Australia in *Amalgamated Society of Engineers v The Adelaide Steamship Co Ltd* [1920] 28 CLR 129 eschewed so-called 'political criteria' in the interpretation of the Australian Constitution and so lessened considerably the range of circumstances where it might be called upon to intervene more directly in political processes.

Authors on the Malaysian Constitution do not refer specifically to the doctrine of separation of powers. RH Hickling on "*Malaysian Public Law*" states that the Government of Malaysia has three significant characteristics:

(a) the Constitution by which terms the Federation was established is supreme [art. 4];

(b) The Constitution distributes powers between the Federal and State governments and legislative power runs concurrently with executive authority [art. 80]; and

(c) All disputes between the federal and state governments or between two state governments must be decided in default of agreement, by the Federal Court (art. 128).

Again according to *Hickling (supra)* the Independence Constitution of 1957 made (in similar comparison to the doctrine of separation of powers in United States) a forceful distinction in arts. 39, 44, 121. Tun Muhammad Suffian bin Hashim in *An Introduction to the Constitution of Malaysia* (2nd edn) - (p. 97) has mentioned a similar distinction when he observed that the constitution divides the authority of the Federation into three kinds, namely executive authority (art. 39) the legislative authority vested in Parliament (art. 44) and the judicial power (art. 121).

Tun Suffian, supra, has described the Yang di-Pertuan Agong as a constitutional monarch, and as the Head of State of Malaysia takes precedence over all persons in Malaysia. In his words the Yang di-Pertuan Agong is elected and yet not a President, and he is a hereditary Sultan and yet the Yang di-Pertuan Agong holds office only for five years. As the Reid Constitutional Commission has recommended, the Yang di-Pertuan Agong is a symbol of the unity of the country and as such personifies in the words of Hickling "the legislative, executive and judicial powers of the Federation.

The constitutional position of the judiciary is defined in Part IX of the Federal Constitution. Up to this point of time in judicial history the leading case that has discussed the judicial power of the Federation of Malaysia is *Dato' Yap Peng v. Public Prosecutor* [1987] 1 MLJ 311. In that case the respondent was charged with criminal breach of trust in the Sessions Court of Kuala Lumpur on 19 December 1986. When his case was mentioned again on 29 December 1986, the Deputy Public Prosecutor tendered a certificate issued by the Public Prosecutor under s. 418A of the Criminal Procedure Code requiring the case to be reviewed to the High Court. The request for transfer was complied with and when the respondent was formally charged in the High Court in Kuala Lumpur on 6 January 1987, objection was taken on his behalf to the transfer of the case from the sessions court on a challenge mounted against the constitutional validity of s. 418A of the Criminal Procedure Code on the basis that it infringes art. 121(1) and art. 5(1) of the Federal Constitution. Zakaria J (as he then was) held s. 418A to be unconstitutional and void in that it is inconsistent with art. 121(1) of the Federal Constitution and that the certificate issued by the Public Prosecutor thereunder was accordingly invalid and of no effect and ordered the case to be remitted to the sessions court for trial. The Public Prosecutor appealed. The Supreme Court by a majority Lee Hun Hoe CJ (Borneo), Mohamed Azmi and Abdoolcader SCJ dismissed the appeal. The leading majority judgment was delivered by Abdoolcader SCJ with Lee Hun Hoe CJ (Bornoe) concurring. Mohamed Azmi SCJ gave a separate judgment with Salleh Abas LP dissenting and Hashim Yeop A Sani SCJ also dissenting. The majority judgment decided then that s. 418A of the Criminal Procedure Code was unconstitutional and void as being an infringement of art. 121(1) of the Federal Constitution.

I wish to mention in detail the views expressed as the principle contention in that case was the alleged incursion of both legislative and executive authority into judicial power which to my mind is exactly what has been alleged in the present proceedings. The majority judgment, however, did not render a consensus opinion on the definition of judicial power. Even the dissenting judgment held varying views.

The leading judgment of Abdoolcader SCJ stated:

> It is now necessary to turn to consider the purport and effect of section 418A in relation to article 121(1). Article 121(1) provides that subject to clause (2) the judicial power of the Federation shall be vested in two High Courts, namely, the High Court in Malaya and the High Court in Borneo, and in such inferior courts as may be provided by federal law. Judicial power may be broadly defined as the power to examine questions submitted for determination with a view to the pronouncement of an authoritative decision as to rights and liabilities of one or

more parties. It is virtually impossible to formulate a wholly exhaustive conceptual definition of that term, whether inclusive or exclusive, and as Windeyer J observed in the High Court of Australia in *The Queen v. Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (at page 394): "The concept seems to me to defy, perhaps it were better to say transcend, purely abstract conceptual analysis," and again (at page 396) that it is "really amorphous". In *Liyanage & Others v. The Queen Lord Pearce* in delivering the judgment of the Privy Council, in the course of observing that the Judicial Committee did not find it necessary to attempt the impossible task of tracing where the line is to be drawn between what will and what will not constitute an interference with the judicial power, said (at page 290):

> Each case must be decided in the light of its own facts and circumstances, including the true purpose of the legislation, the situation to which it was directed, the existence (where several enactments are impugned) of a common design, and the extent to which the legislation affects, by way of direction or restriction, the discretion or judgment of the judiciary in specific proceedings. It is therefore necessary to consider more closely the nature of the legislation challenged in this appeal.
>
> In my view the provisions of section 418A are both a legislative and executive intromission into the judicial power of the Federation. It is a legislative incursion to facilitate executive intrusion, and the Deputy in answer to a question I put to him had perforce to agree that in the context of subsection (3) of section 418A judicial power would amount to 'doing what you are told to do'. The provisions of section 418A specifically apply to any particular case triable by and pending before a subordinate court and the referential application of the provisions of section 417(3)(b) and (4) by subsection (3) of section 418A clearly refutes the submission put forward for the Public Prosecutor both before us and in the Court below that his power is not limitless and cannot be exercised if the trial before the subordinate Court has commenced and that he can only exercise his power to issue a certificate under subsection (1) of that section if no witnesses have been called or examined and that therefore the section does not offend article 121(1). An invalid legislation interference acts on pending judicial proceedings, either directly or indirectly by executive action arrogating to itself functions proper to the courts, and usurps or obtrudes on the judicial process.

Mohamed Azmi SCJ held:

> In my view, there is no necessity to make a final pronouncement on the meaning of "judicial power" as contained in Article 121(1), for the purpose of determining whether section 418A violates that Article, for even if I were to adopt the limited and narrow meaning of "judicial power" to merely "adjudications upon disputes as to the rights or obligations arising from the operation of law upon past

accounts or conduct" as advanced in Australia in the case of *R v. Gallagher* (an authority not cited by either party) the fact that section 418A enables a case to be transferred by the Public Prosecutor at any time before the conclusion of the trial is clearly an interference with judicial power to adjudicate disputes.

Section 418A clearly confers judicial power on a body which is not a court and as such it is an interference of judicial power of the Federation as enshrined in Article 121 of the Constitution. The most objectional aspect of section 418A is that if in the course of a trial the Public Prosecutor fails to convince the High Court in his application under section 417 that a case is a proper one to be transferred for any of the reasons allowed for transfer, he is empowered under section 418A to practically ignore the High Court's decision and achieve the transfer of the case by issuing a certificate signed by him personally under that impugned section requiring the subordinate court before which the case is pending to remove it to the High Court without assigning any reason and without giving the accused any opportunity to be heard. It is axiomatic that the court does not act in vain, yet that is the extent of the judicial power given by section 418A to the executive.

Clearly, judicial power to transfer cases from a subordinate court of competent jurisdiction as presently provided by section 418A cannot be conferred on any organ of government other than the judiciary.

The dissenting judgment of Salleh Abas LP:

Although there is no exact definition of the words "judicial power", there is however a general agreement amongst judicial authorities that judicial power must be the power to determine and arbitrate disputes of a legal nature in which parties are concerned with the protection of their legal interest as opposed to any other interest. The power to transfer, transmit or remove a case by itself is meaningless. Admittedly, the Court has power to make an order to transfer cases but this power whether exerciseable by a Subordinate Court or a High Court is not a power to determine a dispute. Such power could only be regarded as subsidiary or enabling power.

The power of transfer under section 418A, in my view, is not a judicial power. It is a power given to the Public Prosecutor to enable him to perform his function effectively as the controller and director of criminal justice having regard to the public interest involved. This power by itself is neutral. Its character depends upon who exercises that power and for what purpose. If it is exercised by the Court it partakes of a judicial nature in the sense that the Court has to listen to both parties before deciding to exercise it and one could therefore say that it is an enabling judicial power. But when it is exercised by the Public Prosecutor it is not a judicial power because he is completely guided by the evidence available before him and consideration of public interest. It is therefore a sort of power enabling or facilitating him to perform his duties as the controller and director of

the system of criminal justice in which it is not the right and responsibility of an aggrieved person or the victim of the crime to bring a criminal to book but it is the responsibility of the Public Prosecutor as the custodian of the public interest to do so. I cannot see how this power or even the exercise of it by the Public Prosecutor could be regarded as an encroachment upon the judicial power of the Court. In my view, it is neither a judicial power, nor an encroachment upon that power. We may dislike the provision of section 418A because the Public Prosecutor may not resort to section 417. But however unhappy we may be with these two parallel provisions and with the exercise of his power by the Public Prosecutor, there is no reason why we should regard it as unconstitutional. The system of criminal justice in this country imposes a heavy burden on, and places a complete trust in the Public Prosecutor. We, therefore, have to trust him to exercise his power honestly and sincerely and to have regard to the importance of the public interest involved. If he is lacking in the performance of his duties, according to the established jurisprudence of this country, the remedy does not lie with the Court in declaring the statute giving him such power to be null and void but with the Government or the Parliament to censure and remove him.

Hashim Yeop Sani SCJ:

What is judicial power depends on the Constitution of each country. The word "judicial power" is not defined in our Constitution. But in the context of Article 121 of the Constitution it would be correct to say that the term has the same meaning as discussed in *Muskrat v. U.S.* In the opinion of the U.S. Supreme Court delivered by Mr Justice Day the following appears at page 250:

> It therefore becomes necessary to inquire what is meant by the judicial power thus conferred by the Constitution upon this court, and, with the aid of appropriate legislation, upon the inferior courts of the United States. 'Judicial power', says Mr Justice Miller, in his work on the Constitution, 'is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision'. Miller, Const. 314.

Basu in his Commentary Vol. III, 5th edn, on art. 124 of the Indian Constitution discussed the meaning of judicial decision and judicial power and at p. 63 he distinguishes question of policy from judicial decision.

Without being pedantic I would say that the basic issue here is really whether the power of transfer is a judicial power. What is and what is not judicial power must be examined in the context of the Constitution and federal law. It seems to me that the power to "transfer" *per se* is not judicial power and in the context of our Constitution and federal law it is a neutral subject. It can also be made into judicial power by law and it can also be made into an administrative or executive power by law. Thus in section 417 of the CPC the power of transfer has been made into a judicial power in that the court must upon application

a decide judicially on the transfer. In section 418A of the CPC, however, the law has left it to the discretion of the Public Prosecutor in cases where in his opinion and in the light of facts known to him alone it would be expedient to have the case removed to the High Court without a preliminary enquiry.

Therefore the only rational conclusion one could arrive at is that the power of *b* transfer at least by the subordinate courts is not a judicial power as vested pursuant to Article 121 of the Constitution and Parliament may therefore by law provide for the exercise of transfer which it has done in section 417 and section 418A of the CPC, section 41A of the Dangerous Drugs Act 1952 and section 11 of the Firearms (Increased Penalties) Act 1971.

c The diversity of views expressed in the decision reflected the position that the term "judicial power'' is not capable of an exhaustive or clinical definition. It is now legislative history that after the decision in that case, a legislative amendment was made to Article 121, the current text of which now appears in the current edition of the Federal Constitution where the expression "judicial *d* power" is found as a shoulder heading. I hold the view that until the present time, and despite the addition of art. 121(1A) no further amendment has been made to the Federal Constitution that may be described as being an incursion on judicial power. In particular the provisions of arts. 125 and 128 of the Federal Constitution remain unamended and there is therefore evinced an *e* intention to maintain judicial autonomy within the framework of the Constitution.

I turn now to the application before me where the specific purpose is to secure the release of a person who, it is alleged, is being unlawfully detained. The issue before me is not really a challenge of jurisdictional grounds but a question as to the way in which a sentencing process has been exercised, that is, there *f* is alleged an error of law created in a legislation enacted by Parliament. What seems to be the object of the challenge in the present action is that since there is alleged an illegal sentence the applicant should therefore not continue to be in prison even while the decision on the appeal is still pending.

g Encik Tun Majid has contended that Mr Karpal Singh, in opposing the preliminary objection, has brought forth arguments which have clearly veered into the merits of the application. In my view this is not unexpected since Mr Karpal's arguments in opposition to the preliminary objection is completely interwoven with the object of the application for the writ of *habeas corpus*.

h I need to consider therefore the validity or otherwise of the impugned s. 97 of the Act 1997. If Mr Karpal's submission is accepted it will be tantamount to saying that there was no decision at all since it is alleged that the actual exercise of the power to detain was flawed.

i

On 13 February 1995 Malaysia deposited an instrument of accession to the United Nation Convention on the rights of the Child, a document which was annexed to the UN General Assembly Document A/RES/44/25 (12 December 1989). The Resolution of the General Assembly which was dated 20 November 1989 had annexed to it the text of the convention which Malaysia has now acceded to with certain reservations which are not pertinent for the present matter before me. The convention, under art. 1, prescribes that for the purposes of the convention, a child means every human being below the age of 18 years unless under the law applicable to the child majority is attained earlier. The following provisions are also noted:

Article 6:

(1) States parties recognize that every child has the inherent right to life.

(2) States parties shall ensure to the maximum extent possible the survival and development of the child.

Article 37:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

The Act 2001 provides in s. 2 as follows:

> 'Child' -
>
> (a) means a person under the age of eighteen years; and
>
> (b) in relation to criminal proceedings, means a person who has attained the age of criminal responsibility as prescribed in section 82 of the Penal Code (Act 574);

Section 82 of the Penal Code stipulates:

> Nothing is an offence which is done by a child under ten years of age.

Section 97 of the Act 2001 shows that the Government of Malaysia has introduced legislation which is in consonance with its international obligation under the Convention on the Rights of the Child since the Convention has prescribed that no capital punishment shall be imposed on persons below the age of eighteen.

Section 97 does not prescribe life imprisonment but detention, in the case of an offence committed in the Federal Territory of Kuala Lumpur or Labuan, during the pleasure of the Yang di-Pertuan Agong. Under s. 97(3) once a child is so detained he shall be deemed to be in lawful custody. However upon further examination of s. 97 it is clear that the detention of a child under that section shall be subject to a review at least once a year and a recommendation may be made on the early release or further detention of the child. This actually becomes the crux of the matter for although the Board of Visiting Justices may make a recommendation for early release the Yang di-Pertuan Agong may order the child to be further detained.

The board of visiting justices as defined under s. 2 of the Act 2001 means the board visiting justices constituted under s. 64 of the Prisons Act 1995. In the case of the Federal Territory, the Board of Visiting Justices actually comprises of magistrates of the Federal Territory who are to be ex officio members. No materials were emplaced before me on the scheme of implementation of s. 97. Mr Karpal's argument therefore is directed towards the possible period of indefinite detention which if the judicial reasoning in the *Mollison*'s case were to be transported and interposed in the context of the Malaysian Constitution would result in taking cognizance of the argument that the final detention of the child is being determined not by a court or judicial order but an order of the Executive which in the Malaysian constitutional framework is being accorded to His Majesty the Yang di-Pertuan Agong.

It is an Act of Parliament which has entrusted the Yang di-Pertuan Agong to determine how long and how indeterminate the period of detention of the child in this case would be. Under art. 80 of the Federal Constitution the executive authority of the Federation extends to all matters with respect to which Parliament may make laws and read with art. 74, List 1 of the Ninth Schedule, the federal executive authority in Malaysia would therefore concurrently extend, *inter alia*, to the following matters that is administration of justice, criminal law, juvenile offenders, jurisdiction and powers of courts other than Syariah courts.

Section 97 of the Act 2001 is a section in an Act of Parliament. The gravamen of the challenge mounted by Mr Karpal is really directed towards a piece of Federal law which is ostensibly valid but contains a provision which is alleged to be unconstitutional.

Parliament has the power to legislate under art. 74(1) of the Federal Constitution which states:

> (1) **Without prejudice to any power to make laws conferred on it by any other article**. Parliament may make laws with respect to any of the matters enumerated in the Federal list or the concurrent list ... . (emphasis added)

Clause (1) of that article also preserves by the words "without prejudice to ...." the power of Parliament to make laws by virtue of any article in the Constitution and art. 121(1) is one such article which is in question in the present proceedings.

Before dealing specifically with the question of art. 121(1) I would like to observe that while the judicial process invoked on behalf of the applicant may be an application for a *habeas corpus*, in reality what is being asked to review is not the decision making process of an executive authority but a review of a legislative power.

Parliament by virtue of art. 121(1) of the Federal Constitution has conferred on the High Court under Federal law "jurisdiction and powers". The CJA 1964 is one such Federal law namely an Act of Parliament which prescribes the jurisdiction and powers of the High Court.

The Act 2001 is also a federal law in which s. 97 is found and under which the High Court has acted. One of the arguments in the written submission of counsel for the applicant is that s. 97(2) is void having regard to art. 4(1) of the Federal Constitution. This entails two aspects ie, firstly according to the argument, Parliament has no power to include s. 97 in the Child Act 2001 for the power that Parliament has is the power to include a section where only a

court of law is to be given the power in sentencing exercises as well as in the process of reviewing the detention. As an extension of this argument s. 97(2) is said to infringe art. 5(2). Secondly, it has been argued that the applicant has not been afforded a fair hearing by an independent and impartial court since the order made in pursuance of s. 97 is in substance an executive order.

I do not agree that the approach in the *Mollison*'s case should be adopted here even if *mutatis mutandis*. I wish to elaborate the following reasons:

(a) The Privy Council was not concerned merely with the question of whether there was an infringement of the doctrine of separation of powers.

(b) The Privy Council was applying in respect of Jamaica the provisions of the European Convention for Human Rights, (d) The decision was made in the course of an appeal.

In the process of interpreting the Constitution of Jamaica the Privy Council applied by analogy the approach undertaken by the House of Lords in the *Anderson* case in interpreting certain provisions of the Strasbourg Convention which includes the requirement that any person is charged with a criminal offence "shall be afforded a fair hearing ... by an independent and impartial court". The contents of Chapter III in the Constitution of Jamaica headed "Fundamental rights and freedom" were expressly stated by Lord Bingham in the *Mollison* case to be "loosely based on the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953). Lord Bingham did state that the constitutional provisions relating to human rights should be given a generous and purposive interpretation bearing in mind that "a constitution is not trapped in a time warp but must evolve organically over time to reflect the needs of society."

But even then the Privy Council in arriving at its decision did not transcend the limits of the Constitution of Jamaica. The decision of the Court of Appeal against which the Director of Public Prosecutor had appealed was based on the interpretation of s. 4 of the Jamaica (Constitution) Order in Council 1962. Section 4 which was invoked by the court was also a mechanism which was stated thus:

> Far from protecting existing laws against constitutional challenge section 4 recognises that existing laws may be susceptible to constitutional challenge and accordingly **confers power** on the Court to modify and adapt laws so as to bring them into conformity with the provisions of this 'Order'. The Order referred to is the Jamaica (Constitution) Order in Council 1962. (emphasis added)

In the *Anderson* case although it may be argued that the judgment contain general pronouncements on the question of the doctrine of separation of powers the House of Lords was engaged in the judicial exercise of interpretating the applicable provisions available to the House of Lords. Judicial activism was invoked in its proper context and the context was the interpretation of the several sections of the Human Rights Act 1998. These provisions also revealed that even in the constitutional framework of an unwritten Constitution, the legislative organ of the United Kingdom empowered its judicial organ through the vehicle of legislation to evolve a system of checks and balances. The provisions which are useful to mention are:

Section 2:

(1) A court or tribunal determining a question which has arisen in connection with a convention rights must take into account any -

(a) judgment decision, declaration or advisory opinion of the European Court;

(b) ...

(c) ...

(d) ...

Whenever made or given, so far as in the opinion of the court or tribunal it is relevant to the proceedings in which the question has arisen.

3(1) So far as is possible to so primary legislation and subordinate legislation must be reached and given effect in a way which is compatible with the convention rights.

Section 4:

(1) Subsection 2 applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a convention right.

(2) If a court is satisfied that the provision is incompatible with a convention right it may make a declaration of that incompatibility.

(3) ...

(4) ...

(5) In this section "Court" means -

(b) the House of Lords;

(c) the Judicial Committee of the Privy Council.

It is further noted that s. 6 of the 1998 Act provides that it is unlawful for a public authority to act in a way which is incompatible with a convention right and the definition of the term "public authority" includes a court. Proceedings for challenging that a public authority has acted in a way made unlawful by s. 6 may be brought only *inter alia*, by exercising a right of appeal.

Thus it was in the context of enabling legislation that Lord Bingham observed in the *Anderson* case (at p. 1100):

> In ruling on the rights of the appellant under 6(1) of the Convention, I am satisfied that the House should, in accordance with the will of Parliament expressed in the Human Rights Act, 1998 seek to give effect to the decision of the European Court in *Stafford v. UK*.

Although the provisions in the *Mollison* case and the *Anderson* case concern different yet similar provisions the judicial power was still exercised within the ambit of the legislation which conferred on the court the necessary power. The House of Lords in addressing the issue of the convicted murderer's tariff term by the Home Secretary found that the fixing of tariff of a convicted murderer by the Home Secretary was in violation of art. 6(1) of the Strasbourg Convention that is that a criminal defendant has a right to a fair trial and independent and impartial tribunal, and the House of Lords ruled that the Home Secretary is not an independent and impartial tribunal. However the remedial measure that was found in that case was that the "the only relief which the appellant could obtain would be declaration of incompatibility under s. 4 of the 1998 Act."

The approach taken in explaining the allocation of legislative power and judicial autonomy is found in the following passages:

> The power to release a convicted murderer is conferred on the Home Secretary. He may not exercise that power unless recommended to do so by the Parole Board. But the Parole Board may not make such a recommendation unless the Home Secretary has referred the case to it. And the section imposes no duty on the Home Secretary either to refer a case to the board or to release a prisoner if the Board recommends release. Since, therefore, the section leaves it to the Home Secretary to decide whether or when to refer a case to the Board, and he is free to ignore its recommendation if it is favourable to the prisoner, the decision on how long the convicted murderer should remain in prison for punitive purposes is his alone. It cannot be doubted that Parliament intended this result when enacting s. 29 and its predecessor sections. An entirely different regime was established, in the case of discretionary life sentence prisoners, in s. 28. The contrast was plainly deliberate. In s. 1(2) of the Murder (Abolition of Death Penalty) Act 1965, Parliament was at pains to give judges a power to recommend minimum periods of detention, but not to rule. That was for the Home Secretary.

To read s. 29 as precluding participation by the Home Secretary, if it were possible to do so would not be judicial interpretation but judicial vandalism: it would give the section an effect quite different from that which Parliament intended and would go well beyond any interpretative process sanctioned by s. 3 of the 1998 Act (see *Re S (children: care plan), Re W (children: care plan* [2002] UKHL 10 at [41], [2002] 2 All ER 192 at [41], [2002] 2 AC 291).

For these reasons and also for the reasons given by my noble and learned friends Lord Steyn and Lord Hutton I would accordingly allow the appeal to the extent already indicated with costs in the House and below and make a declaration of incompatibility in terms which have been agreed between the parties:

> Section 29 of the Crime (Sentences) Act 1997 is incompatible with a convention right (that is the right under art. 6 of the European Convention for the Protection of Human Rights to have a sentence imposed by an independent and impartial tribunal) in that the Secretary of State for the Home Department is acting so as to give effect to s. 29 when he himself decides on the minimum period which must be served by a mandatory life sentence prisoner before he is considered for release on life licence.

The issue before the courts in the *Mollison* and *Anderson* cases concern "incompatibility" with the provisions of the Strasbourg Convention. The power was conferred by law to make declarations of incompatibility and where such a declaration is made the Parliament in the United Kingdom consequently was given time to take remedial measures by substituting the powers of the Home Secretary with that of the courts. Thus the decision in the Anderson reveal that the Strasbourg Convention will continue to cause changes in the common law of England and also to be incorporated in the laws of England. However that same decision shows that even in the context of an unwritten constitution the challenge to the validity of a properly enacted legislation was undertaken within the framework of a law which laid down the procedures for judicial review with specific objects namely to ensure compatibility with the Strasbourg Convention.

It is very necessary to note that while the courts in the *Mollison* and *Anderson* cases had in each of the cases made a determination about the constitutionality of a legislation on the ground that there was an infringement of the doctrine of separation of powers, the courts in both cases were also given powers to act on remedial measures which are specifically conferred by legislation. As has been noted above, in the case of Jamaica, the Privy Council acted on s. 4 to substitute references to the Governor General with a reference to the court. In the *Anderson* case the House of Lords in the exercise of specific powers vested in it by Parliament made a declaration of incompatibility.

Under those circumstances it cannot therefore be said that the exercise of judicial power in reviewing the impugned legislation was also not regulated by law specifically conferred in accordance with the provisions of legislation.

In the present proceeding before me the learned counsel for the applicant has specifically argued that s. 97(2) is void having regard to art. 4(1) of the Federal Constitution. Counsel has stated that the legislature has infringed the principle of separation of powers. The challenge to the validity of s. 97(2) therefore amounts to this: Parliament by enacting s. 97(2) in the Act 2001 has exceeded its legislative competence as only a court which has judicial power under the Constitution is to be given the power in a sentencing exercise as well as in the process of reviewing the detention. By reposing the authority in the Yang di-Pertuan Agong Parliament has enacted legislation in violation of art. 4. The Federal Constitution is proclaimed the supreme law under art. 4. Article 4 is peremptory in declaring the Constitution as the fundamental law under which the executive, legislative and judicial organs of the Federation are established. Articles 39, 44 and 121 explain the power of the legislature to make laws, the executive's power to govern and the judiciary's power to adjudicate respectively. But it is art. 4 whereby the Constitution is proclaimed as the fundamental law, which therefore endows and also commands the legal recognition to the limits express or implied that are to be exercised by each of the aforesaid organs. Since what is alleged here is that there is a legislative encroachment into judicial power, in my view such an issue is, by virtue of art. 4 read with art. 128, reserved exclusively for the determination of the Federal Court and falls outside the purview of a High Court. Article 128 has been explained in the case of *Ah Thian v. Government of Malaysia* [1976] MLJ 112. The relevant excerpts of his Lordship's judgment are:

> The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of State legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please.
>
> Under the Constitution written law may be invalid on one of these grounds:
>
> (1) in the case of Federal **written law, because it relates to a matter with respect to which Parliament has no power to make law**, and in the case of State written law, because it relates to a matter which respect to which the State legislature has no power to make law, article 74; or
>
> (2) in the case of both Federal and State written law, because it is inconsistent with the Constitution;

(3) ... The court has power to declare any Federal or State law invalid on any of the above three grounds.

...

But the power to declare any law invalid on ground (1) is subject to three restrictions prescribed by the Constitution.

First, clause (3) of article 4 provides *that the validity of any law made by Parliament or by a State legislature may not be questioned on the ground that it makes provision with respect to any matter with respect to which the relevant legislature has no power to make law, except in three types* of proceedings as follows:

(a) **in proceedings for a declaration that the law is invalid on that ground**: or (emphasis added)

(b) if the law was made by Parliament, in proceedings between the Federation and one or more states; or

(c) if the law was made by a State legislature, in proceedings between the Federation and that State.

It will be noted that proceedings of types (b) and (c) are brought by Government, and there is no need for any one to ask specifically for a declaration that the law is invalid on the ground that it relates to a matter with respect to which the relevant legislature has no power to make law. The point can be raised in the course of submission in the ordinary way. *Proceedings of type (a) may however be brought by an individual against another individual or against Government or by Government against an individual, but whoever brings the proceedings must specifically ask for a declaration that the law impugned is invalid on that ground.*

Secondly, clause (4) of article 4 provides that proceedings of the type mentioned in (a) above may not be commenced by an individual without leave of a judge of the Federal Court and the Federation is entitled to be a party to such proceedings, and so is any State that would or might be a party to proceedings brought for the same purpose under type (b) or (c) above. This is to ensure that no adverse ruling is made without giving the relevant government an opportunity to argue to the contrary.

Thirdly, clause (1) of article 128 provides that only the Federal Court has jurisdiction to determine whether a law made by Parliament or by a State legislature is invalid on the ground that it relates to a matter with respect to which the relevant legislature has no power to make law. This jurisdiction is exclusive to the Federal Court, no other court has it. This is to ensure that a law may be declared invalid on this very serious ground only after full consideration by the highest court in the land.

a And again the sage observation of Raja Azlan Shah FJ has to be reiterated when his Lordship reminded in *Loh Kooi Choon*'s case *(supra)* that "it is in the end the wording of our Constitution itself that is to be interpreted and applied and this wording cannot be overridden by the extraneous principles of other constitutions". His Lordship was then applying what was also observed *b* in the case of *Adegbenro v. Akintola & Anor.*

The specific words that are to be emphasized here in cl. 3 of art. 4 are:

> The validity of any law made by Parliament ... shall not be questioned on the ground that it makes provision with respect to any matter with respect to which *c* Parliament ... has no power to make laws, except in proceedings for a declaration ... .

The issue here is whether Parliament in enacting s. 97 within the Child Act 2001, a federal law has evinced an intention to introduce a provision which is repugnant to art. 4 of the Federal Constitution in the sense that the exercise *d* of judicial power is conferred on the Yang di-Pertuan Agong and not on the judicial organ of the Federation established under art. 121 of the Federal Constitution.

In reality in the present proceedings what is being sought to be reviewed is the competence of Parliament which specifically conferred on the High Court *e* certain powers under s. 97, to pass sentence in accordance with that section. Nevertheless that sentence is now alleged to be illegal on the ground that it is an executive order.

In my view the use of the process of an application for *habeas corpus* to *f* challenge the legality of the sentence is a wrong use of the process and is indeed questionable.

There is no doubt there is an attempt here to resort to a procedure which may perhaps be more expeditious. There is however another point which is not to be overlooked. The jurisdiction of the High Court is being invoked to *g* make a determination that the sentence has resulted in applicant being unlawfully detained on the implied ground that he has not been afforded a fair hearing by an independent and impartial court.

It is essential to note also that in the *Anderson* case the Home Secretary *h* had already exercised his powers several times before the House of Lords made a determinative finding that there was an infringement of the doctrine of separation of powers in the course of interpreting art. 6(1) of the Convention. In the present case there is no subsidiary legislation in force to explain the

i

scheme of implementing s. 97(2). In that sense the filing of the application for review on *habeas corpus* appears to be a very preemptive process. In order for the High Court to arrive at a finding that the applicant has not been afforded a fair hearing by an independent and impartial court it must necessarily precede with a finding that Parliament in legislating upon s. 97(2) has caused an intrusion into judicial power and therefore not competent to do so. This to my mind clearly shows that such an issue may only be properly brought by a process instituted under art. 4(3) of the Federal Constitution.

By referring to the decision in the *Mollison* case there is no doubt that Mr Karpal is also implying that the judicial organ of a State has to be vigilant against the possible encroachment of judicial power. But while that may be true the judicial power of a court is also to be properly exercised within the terms of the law.

This brings me to s. 84 of the Courts of Judicature Act, 1964 which states, *inter alia*, the following:

> 84(1) Wherein any proceedings in the High Court a question arise as to the effect of any provision in the Constitution ... .

I find that this provision enables the High Court to interpret the Federal Constitution. That section however does not at the same time vest in the High Court judicial power to review the legislative power of Parliament in legislating the impugned provision.

While it has been quoted from *Sharpe*, *supra*, that the scope of review on *habeas corpus* is broad and flexible to include an error of law to be subject of review, the error of law alleged here is not an error of the jurisdiction of the High Court and not an error of the executive authority.

Moreover there is another point which militates against the approach taken in the *Mollison* case being interposed in the present proceedings. Article 40 of the Convention on the Rights of a Child does contain provisions similar to art. 6 of the Strasbourg which was the subject of interpretation in the *Mollison* and *Anderson* cases. The provisions of the Convention on the Rights of a Child have not been incorporated into the municipal laws of Malaysia. The full regime of the Convention on the Rights of a Child still remain within the purview of the executive in the area of treaties and external affairs. It is not open therefore for the High Court to imply such a provision for that will not be interpretation. It may amount to judicial vandalism or judicial trespass. It shows the anomaly of the process used here in two aspects ie, first it could only be determined that the applicant has been deprived of a hearing by an

independent and impartial tribunal provided it is already decided that s. 97(2) is indeed unlawful on the ground that it infringes the doctrine of separation of powers and that it is an error of law to vest in the Yang di-Pertuan Agong the power as prescribed in that section.

Secondly even if it is within the competence of the High Court to declare s. 97(2) void, which it does not, it would lead to an absurd situation that while the trial of the applicant before the High Court has been properly conducted in the lawful exercise of a judicial power to conduct trials, the sentence becomes void and thus resulting in the court having to order the release of the applicant. This cannot be intended to be the object of review on *habeas corpus* if the exercise results in a process running parallel to the appeal where a court of coordinate jurisdiction in effect reviews the decision of another court of coordinate jurisdiction. To that extent I agree that there is here in effect a collateral attack.

It has been pointed out that the submission put forth in opposition to the preliminary objection is veering towards the merits of that application. Having been so reminded I do not wish to proceed to address the issue on the purported infringement of art. 5(2) of the Federal Constitution or on the question of patent error as these questions to my mind hinge on the test of validity of legislation enacted by Parliament.

However for completeness I wish to add that there are several other differences between the Westminster model adopted in Malaysia and that of Jamaica worth noting.

I find it somewhat scurrilous to refer to the Yang di-Pertuan Agong as an officer of the Executive. The Yang di-Pertuan Agong as a constitutional monarchy retains a unique position in the constitutional history and development of the Federal Constitution in whichever constitutional function that he may be exercising. A glimpse of the multifarious functions has been elaborated by Hickling, *supra*. Even cabinet ministers are not referred to as an officer of the executive and distinguishable from public officers.

The position of the Governor General in the *Mollison* case under the Constitution of Jamaica should not be equated to the position of the Yang di-Pertuan Agong whose constitutional position is unique to the Constitution of Malaysia itself. The constitutional development in Jamaica vastly differed from Malaysia. Historically a special kind of non-colonial though dependent status was devised for certain islands in the Caribbean by the West Indies Act 1967 following the break up of the Federation of West Indies in 1962 and the

independence of Jamaica and Trinidad and Tobago. The islands were states in association with the United Kingdom where U.K. retained responsibility for defence, external affairs and citizenship; while the Associated States each had control of internal affairs and constitutional amendments. The Caribbean Arrangement did not last long and the Associated States were granted independence. Jamaica therefore does reflect the federal form of Government that include states such as India, Nigeria or Malaysia.

The executive authority of Jamaica is formally vested by the constitution in H.M. the Queen and is exercisable on her behalf by the Governor General directly or through officers subordinate to him.

Finally with regard to the position of the Home Secretary in the United Kingdom as explained in 0 Hood Phillips in *Constitutional and Administrative Law*, 7th edn, pp. 29-30, the Home Secretary exercises the prerogative of the Queen's pleasure in many ways. He is the channel of communication between the subject and the Queen for addresses and petitions. Matters connected with the administration of justice not dealt with by the Lord Chancellor or the Attorney General come within the sphere of the Home Secretary. He is ultimately responsible for the Queen's peace". This again illustrates that a simple equation of the position of the Home Secretary to the Yang di-Pertuan Agong does not disclose the interplay of the exercise of executive, legislative and judicial powers which were being reviewed in the Mollison decision as well as the Anderson decision. The review in both the cases was done not only in accordance with legislation that provided the mechanism to bring about compatibility of legislation with the constitution but also provisions that have the object to ensure that judicial precedent in the House of Lords, the Privy Council and the European Courts do not diverge. The Mollison decision therefore is not such a decision that could be implanted here without the High Court indulging in the exercise of re-writing legislation and not judicial innovation.

In conclusion I wish to add that it also appears that what is sought to achieve is not necessarily confined to a review of the competence of Parliament. It is also arguable that the scope of review is being extended to the question of the death sentence for if it is not to be substituted for detention at the pleasure of the Yang di-Pertuan Agong, what then should be the sentence, since there is no doubt that the appellant has been sentenced by a court which was acting within its jurisdiction. There are here questions of policy which are not justiciable questions. Hence the emphasis on the wrong process being used.

The application is not an abuse in the full sense but to the extent that it is a wrong use of the mode of the process to review the powers of Parliament. The High Court will be acting in excess of its powers if it were to continue with the hearing on the merits of the application in violation of art. 4(3).

The preliminary objection is therefore upheld and I will therefore not proceed with the hearing on the merits of the application for *habeas corpus*.